

**UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND**

CYNTHIA BOSS,

Case No.: 1:17-cv-00042-JJM-LDA

**Plaintiff,**

V.

FEDERAL HOUSING FINANCE AGENCY,  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION, AND SANTANDER BANK,  
N.A.

## Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE  
PLEADINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(c)**

Plaintiff claims that Defendants Federal National Mortgage Association (“Fannie Mae”), a federally chartered private corporation, and the Federal Housing Finance Agency (“FHFA”), a federal agency acting as Fannie Mae’s Conservator, violated her Fifth Amendment due process rights when Fannie Mae conducted a non-judicial foreclosure of her property pursuant to state law. But neither Fannie Mae nor FHFA as its Conservator is a government actor subject to Fifth Amendment constraints. As a result, Plaintiff’s claim fails as a matter of law.

Every federal court to consider whether Fannie Mae or the similarly-situated Federal Home Loan Mortgage Corporation (“Freddie Mac”), which is also under FHFA conservatorship, is a government actor for constitutional purposes—including the Sixth and D.C. Circuits—has held that they are not. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *Mik v. Freddie Mac*, 743 F.3d 149, 168 (6th Cir. 2014).

These courts rely on *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), which provides the test for when an otherwise-private corporation can be deemed a government actor for constitutional purposes. That test requires, among other things, that the government retain permanent control over the corporation. Because Fannie Mae was not a government actor before conservatorship, and conservatorship does not give the government permanent control over Fannie Mae, Fannie Mae cannot be deemed a government actor under

*Lebron.*

FHFA, as Fannie Mae's Conservator, likewise is not a government actor for purposes of constitutional claims. Rather, the Conservator assumes Fannie Mae's private status when overseeing Fannie Mae's ordinary business activities, such as foreclosing on defaulted mortgages. Accordingly, Fannie Mae and FHFA are entitled to judgment as a matter of law.

## **STATEMENT OF ALLEGATIONS**

## A. FHFA and Fannie Mae in Conservatorship

Fannie Mae is a private, publicly-traded corporation chartered by Congress to stabilize the secondary mortgage market and to promote access to mortgage credit. Compl. ¶ 7; *see also Town of Johnston v. FHFA*, 765 F.3d 80, 82 (1st Cir. 2014).

In July 2008, Congress passed the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq.*), which established FHFA. Compl. ¶ 9. FHFA is an independent federal agency with regulatory and oversight authority over Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. *Id.*

In September 2008, FHFA placed Fannie Mae and Freddie Mac (together, “the Enterprises”) into conservatorships “for the purpose of reorganizing, rehabilitating, or winding up [their] affairs.” 12 U.S.C. § 4617(a)(2); Compl. ¶¶ 10-11. In its capacity as Conservator, FHFA succeeded to “all rights, titles, powers, and privileges” of the Enterprises and their respective stockholders, boards of directors, and officers. *See* 12 U.S.C. § 4617(b)(2)(A)(i); Compl. ¶¶ 15, 21. Thus, FHFA assumed the power to oversee Fannie Mae’s operations. *Id.*

HERA also amended the Enterprises' statutory charters to grant the Treasury authority to purchase securities issued by the Enterprises, so long as they reached "mutual agreement" on the terms. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); 12 U.S.C. § 1455(l)(1)(A) (Freddie Mac). Pursuant to this authority, Treasury and the Conservator entered into Senior Preferred Stock Purchase Agreements for each Enterprise, through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises as needed. Compl. ¶¶ 24-29.

1                   **B.       Foreclosure Proceedings**

2                   Plaintiff is the owner of real property located at 39 Pichette Blvd., Woonsocket, Rhode  
 3 Island (the “Property”). Compl. ¶ 1. In March 2016, Fannie Mae conducted a non-judicial  
 4 foreclosure sale of the property and recorded a foreclosure deed. Compl. ¶¶ 45-46. Fannie Mae  
 5 rescinded the foreclosure on April 4, 2017. ECF Nos. 8-9.

6                   **C.       Plaintiff’s Claim**

7                   Plaintiff’s sole cause of action in this matter is deprivation of property without due  
 8 process. Compl. ¶¶ 51-61. Specifically, Plaintiff maintains that FHFA and Fannie Mae acted  
 9 jointly to deprive her of ownership rights in the Property by conducting a non-judicial  
 10 foreclosure under Rhode Island Chapter 34-27. Compl. ¶ 52. Plaintiff claims that this non-  
 11 judicial foreclosure violated the Due Process Clause of the Fifth Amendment of the United States  
 12 Constitution. Compl. ¶¶ 53-54. Based upon these purported due process violations, Plaintiff  
 13 claims deprivation of ownership in the Property, cloud on title, impairment of her ability to sell,  
 14 rent or otherwise alienate the Property, damage to her credit rating, reduced chance of obtaining  
 15 a future mortgage, eviction, and loss of security in her dwelling. Compl. ¶ 55. Plaintiff further  
 16 claims damages as a result of the alleged due process violation, including costs and expenses of  
 17 the foreclosure added to her account, loss of equity in the Property, and expenses due to postage,  
 18 mailing, and long-distance telephone calls. Compl. ¶ 61.

19                   **LEGAL STANDARD**

20                   A motion for judgment on the pleadings under Rule 12(c) is decided under the same  
 21 standard as a motion to dismiss. *Trombley v. Bank of Am. Corp.*, 715 F. Supp. 2d 290, 292  
 22 (D.R.I. 2010). A complaint cannot survive such a motion if “the plaintiff can prove no set of  
 23 facts in support of his claim which would entitle him to relief.” *Curran v. Cousins*, 509 F.3d 36,  
 24 43 (1st Cir. 2007) (citation omitted). In deciding the motion, the Court must “view the facts  
 25 contained in the pleadings in the light most favorable to the party opposing the motion—here, the  
 26 plaintiff—and draw all reasonable inferences in the plaintiff’s favor.” *Id.*

## **ARGUMENT**

Plaintiff asserts that Fannie Mae and FHFA denied her due process under the Fifth Amendment of the United States Constitution. Compl. ¶¶ 51-61. Plaintiff's assertion fails as a matter of law. "It is well-settled that the due process provision of the Fifth Amendment serves as a limitation only on governmental, not private, action." *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 79 (1st Cir. 2005). Fannie Mae is not a government entity, nor do Fannie Mae's actions constitute federal action for purposes of triggering constitutional due process protections. Prior to conservatorship, Fannie Mae was a private corporation. No one contends it was a government actor, nor could anyone—precedent confirms unequivocally that it was not. During conservatorship, FHFA controls Fannie Mae but that control is neither permanent nor governmental, as applicable precedent requires for an otherwise-private corporation to be deemed a government actor. Indeed, when acting as Conservator of Fannie Mae, FHFA is not a government entity for purposes of the Fifth Amendment. When FHFA placed Fannie Mae into conservatorship, the agency stepped into the shoes of a *private* corporation to conduct its day-to-day operations and thereby assumed Fannie Mae's *private* status, not vice versa. Thus, FHFA, as Conservator, does not act as part of the government for purposes of constitutional claims.

## **I. FANNIE MAE IS NOT A GOVERNMENT ACTOR FOR PURPOSES OF CONSTITUTIONAL CLAIMS**

For almost 50 years, Fannie Mae has operated as a private corporation “created by federal charter to support the development of the secondary mortgage market.” *Town of Johnston*, 765 F.3d at 82. Originally created by the National Housing Act of 1934, Congress transformed Fannie Mae’s status from a government entity into a private entity in 1968. *Housing and Urban Development Act of 1968*, Pub. L. No. 90-448, 82 Stat. 476 (1968). Since 1968 and prior to conservatorship in 2008, Fannie Mae was not a government actor for purposes of constitutional claims. *See Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 359 (5th Cir. 1977) (rejecting due process claim brought by a borrower against pre-conservatorship Fannie Mae for commencing a non-judicial foreclosure); *Northrip v. Fannie Mae*, 527 F.2d 23, 30 (6th Cir. 1975) (rejecting claim that pre-conservatorship Fannie Mae was a federal actor subject to the Due Process Clause of the Fifth Amendment); *see also Am. Bankers Mortg. Corp. v. Freddie Mac*, 75 F.3d 1401,

1 1409 (9th Cir. 1996) (citing *Lebron* and holding that pre-conservatorship Freddie Mac was not a  
 2 government actor for purposes of a constitutional claim).

3 The key issue here, therefore, is whether conservatorship converted Fannie Mae into a  
 4 government actor. It did not. Federal courts have unanimously held that Fannie Mae, even in  
 5 conservatorship, maintains its private identity for purposes of constitutional claims. These courts  
 6 rely on *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), which  
 7 governs the analysis of whether a federally chartered, private corporation can be deemed a  
 8 government actor. Under the *Lebron* framework, Fannie Mae is not a government actor because  
 9 FHFA's conservatorship—even if assumed to amount to *government control*—does not involve  
 10 *permanent control*.<sup>1</sup>

11       **A.     Federal Courts Have Unanimously Held That the Enterprises Are Not**  
 12       **Government Actors While in Conservatorship for Purposes of Constitutional**  
 13       **Claims**

14 Every federal court to have considered the issue has held that Fannie Mae and Freddie  
 15 Mac, while in conservatorship, are not government actors for purposes of constitutional claims.  
 16 See, e.g., *Herron*, 861 F.3d at 169; *Mik*, 743 F.3d at 168. Most recently, the D.C. Circuit held  
 17 that conservatorship “does not transform Fannie Mae into a government actor” and dismissed the  
 18 plaintiff’s First Amendment *Bivens* claim. *Herron*, 861 F.3d at 169. Similarly, the Sixth Circuit  
 19 held that “Freddie Mac is not a government actor who can be held liable for violations of the  
 20 Fifth Amendment’s Due Process Clause.” *Mik*, 743 F.3d at 168; see also *Rubin v. Fannie Mae*,  
 21 587 F. App’x 273, 275 (6th Cir. 2014) (same for Fannie Mae in the context of a non-judicial  
 22 foreclosure).

23 Likewise, district courts routinely hold that the Enterprises are not part of the government  
 24 for constitutional purposes while in conservatorship. As one district court explained, “[b]ecause  
 25 the FHFA lacks permanent control over Fannie Mae, Fannie Mae is not a state actor, and  
 26 Plaintiff’s constitutional claims cannot survive.” *Matveychuk v. One W. Bank, FSB*, No. 1:13-  
 27 cv-3464-AT, 2016 WL 4059681, at \*3 (N.D. Ga. Jan. 28, 2016); see also, e.g., *Dias v. Fannie*

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28 <sup>1</sup> As discussed in Section II below, FHFA’s conservatorship of Fannie Mae does not  
 constitute governmental control.

1      *Mae*, 990 F. Supp. 2d 1042, 1062 (D. Haw. 2013) (“The Court agrees with those courts . . . that  
 2      have considered and rejected Plaintiff’s argument that Fannie Mae is a government actor by  
 3      virtue of the FHFA conservatorship.”); *Freddie Mac v. Shamoon*, 922 F. Supp. 2d 641, 645 (E.D.  
 4      Mich. 2013) (“FHFA’s conservatorship of Freddie Mac does not and cannot transform that  
 5      private corporation into a government actor . . . .”); *May v. Wells Fargo Bank, N.A.*, No. 4:11-cv-  
 6      3516, 2013 WL 3207511, at \*5 (S.D. Tex. June 24, 2013) (“[D]espite FHFA’s conservatorship,  
 7      Freddie Mac is not a government actor.”); *Syriani v. Freddie Mac Multiclass Certificates, Series*  
 8      3365, No. 12-cv-3035-JFW, 2012 WL 6200251, at \*4 (C.D. Cal. July 10, 2012) (“Freddie Mac  
 9      does not become a governmental actor for Fifth Amendment purposes merely because it is  
 10     placed into conservatorship.”). Notably, the majority of these authorities involve foreclosure  
 11     disputes, just as this case.

12           Applying these decisions here, it is clear that by placing Fannie Mae into conservatorship  
 13     and acting in its capacity as Conservator of Fannie Mae, FHFA did not transform Fannie Mae  
 14     into a government actor for purposes of constitutional claims.

15           **B.      *Lebron* Controls the Government-Actor Analysis for Constitutional Claims  
 16                    against Otherwise-Private Corporations and Requires that the Government  
 17                    Retain Permanent Control**

18           The federal courts above have relied on and correctly applied *Lebron* in determining that  
 19     the Enterprises are not government actors for purposes of constitutional claims. *See, e.g.,*  
 20     *Herron*, 861 F.3d at 167 (“[W]e apply the framework the Supreme Court established in *Lebron*  
 21     for determining whether a ‘Government-created and -controlled corporation[ ]’ is a government  
 22     actor for constitutional purposes.”); *Mik*, 743 F.3d at 168. And two additional Courts of Appeals  
 23     have applied *Lebron* to hold that the Enterprises are not government actors for other purposes.  
 24     *See Meridian Invs., Inc. v. Freddie Mac*, 855 F.3d 573, 579 (4th Cir. 2017); *U.S. ex rel. Adams v.*  
 25     *Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016). Thus, four federal appellate  
 26     courts agree that under *Lebron* Fannie Mae and Freddie Mac are not government actors even  
 27     though they are in FHFA’s conservatorship. These courts’ uniform analysis and application of  
 28     *Lebron* is correct.

29           In *Lebron*, the Supreme Court held that where “[1.] the Government creates a corporation

1 by special law, [2.] for the furtherance of governmental objectives, and [3.] retains for itself  
 2 *permanent authority* to appoint a majority of the directors of that corporation, the corporation is  
 3 part of the Government for purposes of the First Amendment.” 513 U.S. at 399 (emphasis  
 4 added). In holding that Amtrak was part of the government, the Supreme Court emphasized that  
 5 “Amtrak is not merely in the *temporary* control of the Government (as a private corporation  
 6 whose stock comes into federal ownership might be),” but rather was under *permanent*  
 7 government control. *Id.* at 398 (emphasis added). *Lebron* remains the operative test and  
 8 permanent control is a necessary element. *See Dep’t of Transp. v. Ass’n of Am. Railroads*, 135  
 9 S. Ct. 1225, 1233 (2015) (citing favorably to *Lebron*); *Barrios-Velazquez v. Asociacion de*  
 10 *Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 492 (1st Cir. 1996)  
 11 (recognizing that permanent control is a necessary element).

12       *Lebron* confirms that conservatorship does not transform Fannie Mae into a government  
 13 actor for purposes of constitutional claims because the conservatorship does not grant the  
 14 government permanent authority to appoint a majority of Fannie Mae’s directors. Plaintiff  
 15 alleges that “the Board of Directors of Fannie Mae is entirely appointed by FHFA,” Compl. ¶ 31,  
 16 but omits that as a matter of law, FHFA holds that prerogative only as Conservator, not as Fannie  
 17 Mae’s regulator. *Compare* 12 U.S.C. § 1723(b) (Fannie Mae charter provision stating that “[t]he  
 18 Federal National Mortgage Association shall have a board of directors, which shall consist of 13  
 19 persons . . . who shall be elected annually by the common stockholders.”) *with* 12 U.S.C.  
 20 § 4617(b)(2)(A)(i) (FHFA, when appointed “as [C]onservator,” shall “by operation of law,  
 21 immediately succeed to . . . all rights, titles, powers, and privileges of [Fannie Mae], and of any  
 22 stockholder, officer, or director.”). Accordingly, FHFA’s authority to appoint Fannie Mae’s  
 23 directors will last only as long as the conservatorship remains in place, and conservatorship is  
 24 inherently temporary.

25       As the D.C. Circuit explained in *Herron*:

26       While the conservatorship authorized the government to exercise  
 27 substantial control over Fannie Mae, “that control is temporary, ‘as  
 28 a private corporation whose stock comes into federal ownership  
             might be.’” *See Meridian Invs.*, 855 F.3d at 579 (quoting *Lebron*,  
 513 U.S. at 398, 115 S. Ct. 961). Thus, the government’s

1                    indefinite but temporary control does not transform Fannie Mae  
 2                    into a government actor. *See Lebron*, 513 U.S. at 399, 115 S.Ct.  
 3                    961 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102,  
 152, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)).

4                    861 F.3d at 169.

5                    Plaintiff's assertion that “[t]here is no other law, regulation, policy or directive that  
 6                    provides either a date or specifies conditions by which FHFA's control over Fannie Mae will  
 7                    terminate,” Compl. ¶ 22, is true but beside the point. Whatever might be argued (or speculated)  
 8                    about the possible duration of the conservatorship, Fannie Mae is not subject to *permanent*  
 9                    control by the government, as the conservatorship did not grant FHFA *permanent* authority to  
 10                  appoint a majority of Fannie Mae's directors.

11                  Rather, in HERA, Congress empowered FHFA to act as conservator of Fannie Mae for  
 12                  purposes of “reorganizing, rehabilitating, or winding up [its] affairs.” 12 U.S.C. § 4617(a)(2).  
 13                  This naturally limits the Conservator's authority to a certain resolution—“reorganizing,  
 14                  rehabilitating, or winding up [Fannie Mae's] affairs”; it does not grant FHFA permanent  
 15                  authority. Indeed, “[a]lthough there is no specific termination date, the purpose of the  
 16                  conservatorship is to restore Fannie Mae to a stable condition.” *Herron*, 861 F.3d at 169. As a  
 17                  result, FHFA's (assumed) control is merely indefinite, not permanent. “Thus, the government's  
 18                  indefinite but temporary control does not transform Fannie Mae into a government actor.” *Id.*

19                  Nor can Plaintiff point to anything inherent in Fannie Mae's structure as indicative of  
 20                  permanent government control, as a comparison with Amtrak's structure in *Lebron* confirms. In  
 21                  *Lebron*, Amtrak's charter established permanent government control because “six of the  
 22                  corporation's eight externally named directors (the ninth is named by a majority of the board  
 23                  itself) are appointed directly by the President of the United States.” 513 U.S. at 397. By  
 24                  contrast, Fannie Mae's charter has no such structure where the government permanently appoints  
 25                  Fannie Mae's directors—“The Federal National Mortgage Association shall have a board of  
 26                  directors, which shall consist of 13 persons . . . who shall be elected annually by the common  
 27                  stockholders.”<sup>2</sup> 12 U.S.C. § 1723(b).

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28                  <sup>2</sup> In *Lebron*, the Supreme Court focused solely on the permanent, structural control the government retained under  
 the provision of Amtrak's charter that granted the President authority to appoint six of Amtrak's nine directors.

(Footnote Cont'd on Following Page)

1           Additionally, although the Congressional Budget Office (“CBO”) included the  
 2 Enterprises’ operations in the federal budget and has said that the Enterprises are “effective[ly]”  
 3 part of the government for CBO’s purposes, Compl. ¶¶ 12-14, the CBO has not said that the  
 4 existing government control will be permanent, which is the relevant factor in the *Lebron*  
 5 analysis. In fact, the CBO has noted that Fannie Mae and Freddie Mac “are not legally  
 6 government agencies, and their employees are not civil servants.” Compl., Ex. 2 at 2.

7           Plaintiff also seems to claim that Fannie Mae is under permanent control because “[e]ven  
 8 if the conservatorship were terminated[,] Fannie Mae will remain subject to the control of the  
 9 United States Treasury through the senior preferred stock purchase agreement [PSPA], senior  
 10 preferred stock, and warrant to purchase common stock.” Compl. ¶ 23. But as the Fourth  
 11 Circuit recently held, “although the government does exert some control . . . through the PSPA  
 12 with Treasury, that control is *temporary* . . . . The Supreme Court has long held that, when the  
 13 government acquires an ownership interest in a corporation, it acts—and is treated—as any other  
 14 shareholder.” *Meridian Invs., Inc.*, 855 F.3d at 579 (holding that Freddie Mac is not a  
 15 government actor for statute-of-limitations purposes under 28 U.S.C. § 2401(a)) (citing *Lebron*,  
 16 513 U.S. at 398 and *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. 904, 907 (1824)) (emphasis  
 17 added).

18           Indeed, while the government undoubtedly would have temporally indefinite control over  
 19 “a private corporation whose stock comes into federal ownership,” that is the precise example  
 20 the Supreme Court uses to illustrate the *absence* of permanent government control over the  
 21 corporation. *Lebron*, 513 U.S. at 398 (“Amtrak is not merely in the *temporary* control of the  
 22 Government (*as a private corporation whose stock comes into federal ownership might be*)  
 23 (*emphases added*).”). Thus, conservatorship does not amount to permanent government control

24  
 25  
 26 (Footnote Cont'd From Previous Page)

27           *Lebron*, 513 U.S. at 397. The Court did not deem it significant that the President also had *temporary* authority, by  
 28 virtue of a financial assistance arrangement, to appoint two additional directors; rather, the Court recites that as a  
 fact but omits it completely from the analysis of whether Amtrak would be deemed a government actor. *Id.* at 397-  
 99. This confirms that only permanent and structural indicia of control are significant to the analysis.

1 and does not impose government-actor status onto Fannie Mae; rather, Fannie Mae retained its  
 2 pre-conservatorship status as a private actor for purposes of constitutional claims.

3 Under the *Lebron* framework, and as numerous courts have held, Fannie Mae is not a  
 4 government actor that can be held liable for constitutional violations. This Court should hold the  
 5 same.

6 **II. THE CONSERVATOR IS NOT A GOVERNMENT ACTOR FOR PURPOSES OF  
 7 CONSTITUTIONAL CLAIMS**

8 Nor can Plaintiff plausibly argue the FHFA, as Fannie Mae’s Conservator, is a  
 9 government actor for purposes of Plaintiff’s constitutional claim.<sup>3</sup> Federal courts that have  
 10 addressed the question of whether FHFA, as Conservator, is a federal actor for purposes of  
 11 constitutional claims have, again, unanimously held that it is not. This is so because HERA  
 12 provides that the Conservator—by operation of law, upon the inception of conservatorship—  
 13 succeeds to “all rights, titles, powers, and privileges of the regulated entity, and of any  
 14 stockholder, officer, or director.” 12 U.S.C. § 4617(b)(2)(A)(i). As the D.C. Circuit explains,  
 15 HERA “evinces Congress’s intention to have the FHFA step into Fannie Mae’s private shoes” and  
 16 for FHFA to “shed[] its government character,” not vice versa. *Herron*, 861 F.3d at 169  
 17 (alteration in original) (citation omitted). Here, when FHFA acts in its capacity as Conservator,  
 18 it stands in the shoes of Fannie Mae. Plaintiff’s claim against FHFA is effectively a claim  
 19 against Fannie Mae, which is not a government entity. Thus, acting as Conservator, FHFA is no  
 20 longer acting as a government entity for purposes of constitutional claims.

21 All district courts that have addressed the issue have held the same. See, e.g., *Parra v.*  
 22 *Fannie Mae*, No. 13-cv-04031, 2013 WL 5638824, at \*3 (C.D. Cal. Oct. 16, 2013) (“FHFA,  
 23 which took over as Fannie Mae’s conservator, also does not qualify as a government actor [for  
 24 Fifth Amendment purposes].”); *Dias*, 990 F. Supp. 2d at 1061 (“Similarly, the FHFA, which  
 25 took over as Fannie Mae’s conservator, also does not qualify as a government actor.”); *Syriani*,  
 26 2012 WL 6200251, at \*4 (“[FHFA], as conservator for Freddie Mac, ‘step[ped] into the shoes’

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27 <sup>3</sup> Plaintiff sues FHFA in its capacity as Conservator of Fannie Mae, not as Regulator, and offers no allegation that  
 28 could support a claim against FHFA as regulator.

1 of Freddie Mac . . . .); *Shamoon*, 922 F. Supp. 2d at 645 (“FHFA, as conservator, merely ‘steps  
2 into the shoes’ of Freddie Mac, a private corporation.”).

3 Similarly, the Fourth and Ninth Circuits each applied *Lebron* to FHFA as Conservator  
4 and held that because the Conservator assumes the Enterprises’ private status it is not a  
5 government actor. In the Fourth Circuit, the court held that “as conservator[, FHFA] steps into  
6 Freddie Mac’s shoes, shedding its government character and also becoming a private party.”  
7 *Meridian Invs., Inc.*, 855 F.3d at 579 (applying *Lebron* test in holding that Freddie Mac was not  
8 a government actor for statute-of-limitations purposes under 28 U.S.C. § 2401(a)). Similarly,  
9 the Ninth Circuit held that conservatorship “places FHFA in the shoes of Fannie Mae and  
10 Freddie Mac, and gives the FHFA *their* rights and duties, not the other way around.” *Adams*,  
11 813 F.3d at 1260-61 (applying *Lebron* test in holding that Fannie Mae and Freddie Mac are not  
12 “officers, employees, or agents of the federal government” for purposes of the False Claims  
13 Act). Indeed, the D.C. Circuit in *Herron* cited to these cases in its ruling. *Herron*, 861 F.3d at  
14 169.

15 Cases involving other federal agencies acting as conservators or receivers confirm the  
16 point that they assume the private status of the entity in conservatorship or receivership and do  
17 not act as the government. In *O’Melveny & Myers v. FDIC*, the Supreme Court construed the  
18 materially identical language of 12 U.S.C. § 1821(d)(2)(A)(i), which applies to FDIC  
19 receiverships, as “indicat[ing] that the FDIC as receiver ‘steps into the shoes’ of the [pre-  
20 existing institution], obtaining the rights ‘of th[e] institution’ that existed prior to receivership.”  
21 512 U.S. 79, 86 (1994).<sup>4</sup> As Judge Lagueux of this District held, this is because “when the  
22 FDIC is acting as a receiver it is performing a function normally accomplished by a private  
23 entity rather than a federal agency. As a receiver, the FDIC does not act on behalf of the  
24 United States government, and it does not perform any function unique to the federal  
25 government. Instead, it acts on behalf of the failed bank in the interest of that bank’s  
26

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27 <sup>4</sup> Because their statutory schemes are similar, courts routinely look to FDIC precedent as helpful in interpreting the  
28 legal obligations raised by HERA. See, e.g., *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 605 (D.C. Cir. 2017);  
*Cty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013).

1 creditors.” *Schock v. FDIC*, 118 F. Supp. 2d 165, 169-70 (D.R.I. 2000). Accordingly, the  
2 appointment of the FDIC as conservator or receiver of a financial institution means the FDIC  
3 assumes that entity’s private status. *See, e.g., Ameristar Fin. Servicing Co. LLC v. United*  
4 *States*, 75 Fed. Cl. 807, 812 (2007) (dismissing claim because the FDIC as conservator “was  
5 not acting as the United States”); *see also United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir.  
6 1994) (When acting “[i]n its capacity as receiver, the [Resolution Trust Corporation] stands as  
7 a private, non-governmental entity, and is not the Government for purpose of the Double  
8 Jeopardy Clause.”).

9 Because FHFA as Conservator does not act as the United States for constitutional  
10 claims, the Court should enter judgment against Plaintiff.

11 **CONCLUSION**

12 For the reasons set forth herein, Fannie Mae and FHFA respectfully request that the  
13 Court grant their motion for judgment on the pleadings and enter judgment in their favor.

14 Respectfully submitted,

15  
16 Dated: December 15, 2017

17  
18 FEDERALHOUSING FINANCE AGENCY  
19 AND FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,

20 By Their Attorney,

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the District of Rhode Island by using the CM/ECF system on December 15, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/S/ Samuel C. Bodurtha

Samuel C. Bodurtha